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United States of America

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

22 The plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt,  
23 United States Attorney, and Joseph J.M. Orabona, Assistant United States Attorney, hereby files its  
24 Response in Opposition to Defendant Vasquez-Cabral's above-referenced Motions. This Response  
25 in Opposition is based upon the files and records of the case, together with the attached statement of  
26 facts and memorandum of points and authorities.

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**I****STATEMENT OF THE CASE**

On April 9, 2008, a federal grand jury in the Southern District of California returned a three-count Indictment charging Ramon Vasquez-Cabralles, Bernice Pelayo-Hernandez, and Denise Pelayo-Hernandez with transportation of illegal aliens and aiding and abetting, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II). On April 10, 2008, Defendants were arraigned on the Indictment and each Defendant pled not guilty. On April 29, 2008, Defendant Vasquez-Cabralles filed motions to compel discovery and leave to file further motions. The United States files the following response in opposition to Defendant Vasquez-Cabralles' motions.

**II****STATEMENT OF FACTS****A. OFFENSE CONDUCT****1. Events Leading To Apprehension**

On March 25, 2008, Border Patrol Agents were assigned to patrol duties near Boulevard, California in marked vehicles. Boulevard, California, is approximately five miles north of the U.S.-Mexico international border and approximately twenty miles east of Tecate, California, Port of Entry. At approximately 9:57 p.m., agents observed a white Ford F-150 pickup truck traveling northbound with the driver and passenger visible and the truck appeared heavily laden as it bounced excessively. Agents followed the truck onto Interstate 8. Agents performed a registration check and learned the truck was registered with a release of liability. In the agents experience, illegal alien and drug smugglers use vehicles with a release of liability in order to conceal the identity of the true owner of the vehicle. Agents pulled alongside the truck and observed the driver, later identified as Ramon Vasquez-Cabralles, and observed a tarp covering the bed area of the pickup truck. The truck exited the freeway and turned into a driveway with a locked gate. While the truck was stopped, agents observed several people moving around underneath the tarp in the back of the truck. Agents exited their vehicles and approached the truck, where they found the driver and nine individuals – one in the passenger seat, one on the floorboard, and seven laying down underneath the tarp in the bed of the truck. All nine individuals freely admitted to being citizens and nationals of Mexico without any documentation to enter or legally

1 remain in the United States. All nine individuals were arrested and transported for processing.

2 At approximately 11:00 p.m., Border Patrol agents assigned to the Highway 94 checkpoint in  
3 Jamul, California, encountered two females, later identified as Bernice Pelayo-Hernandez and Denise  
4 Pelayo-Hernandez, approach the primary lanes in a gold Dodge Intrepid. Both females claimed to be  
5 United States citizens, but the driver, Bernice Pelayo-Hernandez, did not have any identification and  
6 was referred to secondary inspection for further checks.

7 While in the secondary area, Bernice Pelayo-Hernandez told agents that she had come directly  
8 from Tecate, Mexico, and that she had been in Mexico. However, records checks revealed that the car  
9 driven by Bernice Pelayo-Hernandez had not crossed into the United States from Mexico within the last  
10 72 hours. Bernice Pelayo-Hernandez freely admitted that she contacted a friend, named  
11 "Ramon/Eduardo" to work as a scout for alien smuggling. Her role was to drive past the Golden Acorn  
12 Casino and let "Ramon/Eduardo" know whether the area was clear of Border Patrol and California  
13 Highway Patrol. Bernice Pelayo-Hernandez said she had not be contacted and so she assumed that the  
14 vehicle for which she was a scout had been caught. Agents arrested Bernice and Denise Pelayo-  
15 Hernandez for alien smuggling.

16 **2. Post-Arrest Statements**

17 Agents advised Bernice Pelayo-Hernandez of her Miranda rights, she acknowledged she  
18 understood her rights, and agreed to waive her rights and speak with agents without the presence of  
19 counsel. Bernice Pelayo-Hernandez, who is a citizen of the United States, said she had been contacted  
20 several times in the past week by a man to see whether she would work as a scout driver for an alien  
21 smuggling vehicle. She told agents that she met the man only once and that she and her sister, Denise,  
22 have smuggled aliens for the man in the past. On this occasions, she was to be paid \$200.00. Bernice  
23 Pelayo-Hernandez also told agents that her sister, Denise, had the registration to the pickup truck, which  
24 was driven by co-defendant Ramon Vasquez-Cabrales, in her purse in the event that they had to unload  
25 the aliens before the checkpoint, have the aliens walk around the checkpoint, while Bernice and Denise  
26 drove the empty truck through the checkpoint to the pickup area on the other side.

27 Agents advised Denise Pelayo-Hernandez of her Miranda rights, she acknowledged she  
28 understood her rights, and agreed to waive her rights and speak with agents without the presence of

1 counsel. Denise Pelayo-Hernandez, who is a citizen of the United States, agreed to accompany her  
 2 sister, Bernice, as a scout driver for an alien smuggling vehicle. Denise Pelayo-Hernandez said that  
 3 their job was to drive to the Border Patrol checkpoint on Highway 94 to see whether it was operational  
 4 and communicate with the smugglers. Denise Pelayo-Hernandez admitted that her sister, Bernice, gave  
 5 her the registration to the pickup truck, which was driven by co-defendant Ramon Vasquez-Cabralles.  
 6 Denise Pelayo-Hernandez told agents that she did not know why her sister gave her the paperwork.

7           **3. Material Witness Statements**

8           Material Witnesses Eduardo Reyes-Rodriguez, Juan Carlos Yepez-Yepez, and Ramon Torres-  
 9 Silva (collectively “Material Witnesses”), freely admitted to being citizens and nationals of Mexico  
 10 without any documentation to enter or remain legally in the United States. Material Witnesses admitted  
 11 that they were going to pay between \$1,300 and \$1,500 to be smuggled into the United States and  
 12 transported to their destination therein. Material Witness Eduardo Reyes-Rodriguez, was shown a  
 13 photographic lineup and was able to identify Defendant Vasquez-Cabralles as the driver of the truck.

14           **B. DEFENDANTS’ CRIMINAL AND IMMIGRATION HISTORIES**

15           Ramon Vasquez-Cabralles is a citizen and national of Mexico. Defendant Vasquez-Cabralles  
 16 does not have any prior criminal convictions, however, he has been apprehended before by Border  
 17 Patrol on or about February 11, 2008. Defendant Vasquez-Cabralles was removed to Mexico shortly  
 18 thereafter.

19           Bernice Pelayo-Hernandez is a citizen of the United States. She has no prior criminal  
 20 convictions, but she has several prior apprehensions for alien smuggling at the San Ysidro, California,  
 21 Port of Entry and at the Border Patrol Checkpoint on Highway 94 on or about: (1) March 4, 2004;  
 22 (2) December 5, 2005; (3) November 16, 2007; and (4) January 21, 2008.

23           Denise Pelayo-Hernandez is a citizen of the United States. She has no prior criminal  
 24 convictions, but she has several prior apprehensions for alien smuggling, on the same days as her sister,  
 25 Bernice, at the San Ysidro, California, Port of Entry and at the Border Patrol Checkpoint on Highway  
 26 94 on or about: (1) March 4, 2004; and (2) January 21, 2008.

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III

**THE UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS  
ALONG WITH MEMORANDUM OF POINTS AND AUTHORITIES**

**A. DEFENDANT'S MOTION TO COMPEL DISCOVERY SHOULD BE DENIED**

5 As of the date of this Motion, the United States has produced 136 pages of discovery (including  
6 reports of the arresting officers and agents, criminal history reports, documents concerning Defendant  
7 Vasquez-Cabralles' prior convictions and immigration history) and one DVD-ROM containing each  
8 Defendant Vasquez-Cabralles' videotaped, post-arrest statements. The United States will continue to  
9 comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jenks Act (18 U.S.C.  
10 §3500 et seq.), and Rule 16 of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."). At this  
11 point the United States has received **no** reciprocal discovery. In view of the below-stated position of  
12 the United States concerning discovery, the United States respectfully requests the Court issue no orders  
13 compelling specific discovery by the United States at this time.

## **1. Brady Material**

The United States has complied and will continue to comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963). Under Brady and United States v. Agurs, 427 U.S. 97 (1976), the government need not disclose “every bit of information that might affect the jury’s decision.” United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980). The standard for disclosure is materiality. Id. “Evidence is material under Brady only if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed to the defense.” United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001).

22 The United States will also comply with its obligations to disclose exculpatory evidence under  
23 Brady v. Maryland, 373 U.S. 83 (1963). Furthermore, impeachment evidence may constitute Brady  
24 material “when the reliability of the witness may be determinative of a criminal defendant’s guilt or  
25 innocence.” United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) (internal quotation marks  
26 omitted). However, the United States will not produce rebuttal evidence in advance of trial. See United  
27 States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

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1                   **2. Any Proposed 404(b) or 609 Evidence**

2                  The United States has complied and will continue to comply with its obligations under  
 3 Rules 404(b) and 609 of the Federal Rules of Evidence (“Fed. R. Evid.”). The United States has already  
 4 provided Defendant Vasquez-Cabralles with a copy of his criminal record, in accordance with Fed. R.  
 5 Crim. P. 16(a)(1)(D).

6                  Furthermore, pursuant to Fed. R. Evid. 404(b) and 609, the United States will provide Defendant  
 7 Vasquez-Cabralles with reasonable notice before trial of the general nature of the evidence of any  
 8 extrinsic acts that it intends to use at trial. See FED. R. EVID. 404(b), advisory committee’s note (“[T]he  
 9 Committee opted for a generalized notice provision which requires the prosecution to appraise the  
 10 defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the  
 11 amendment will supercede other rules of admissibility or disclosure[.]”).

12                   **3. Request for Preservation of Evidence**

13                  The United States will preserve all evidence pursuant to an order issued by this Court. The  
 14 United States objects to an overbroad request to preserve all physical evidence. The United States does  
 15 not oppose Defendant Vasquez-Cabralles’ request to inspect the firearm and ammunition possessed by  
 16 and seized from Defendant Vasquez-Cabralles in the instant offense.

17                   **4. Defendant’s Statements**

18                  The United States has turned over a number of investigative reports, including those which  
 19 disclose the substance of Defendant Vasquez-Cabralles’ oral statements made in response to routine  
 20 questioning by United States’ law enforcement officers. If additional reports by United States’ agents  
 21 come to light, the United States will supplement its discovery. The United States recognizes its  
 22 obligations under Fed. R. Crim. P. 16(a)(1)(A) to disclose “the substance of any relevant oral  
 23 statement made by the defendant, before or after arrest, in response to interrogation by a person the  
 24 defendant knew was a government agent if the government intends to use the statement in trial.”  
 25 However, the United States is not required under Fed. R. Crim. P. 16 to deliver oral statements, if any,  
 26 made by a defendant to persons who are not United States’ agents. Nor is the United States required  
 27 to produce oral statements, if any, voluntarily made by a defendant to United States’ agents. See United  
 28 States v. Hoffman, 794 F.2d 1429, 1432 (9th Cir. 1986); United States v. Stoll, 726 F.2d 584, 687-88

1 (9th Cir. 1984). Fed. R. Crim. P. 16 does not require the United States to produce statements by  
 2 Defendant Vasquez-Cabralles that it does not intend to use at trial. Moreover, the United States will not  
 3 produce rebuttal evidence in advance of trial. See Givens, 767 F.2d at 584.

4 The United States also objects to Defendant Vasquez-Cabralles' request for an order for  
 5 production of any rough notes of United States' agents that may exist. Production of these notes, if any  
 6 exist, is unnecessary because they are not "statements" within the meaning of the Jencks Act unless they  
 7 contain a substantially verbatim narrative of a witness' assertions and they have been approved or  
 8 adopted by the witness. See discussion infra Part III.A.19; see also United States v. Alvarez, 86 F.3d  
 9 901, 906 (9th Cir. 1996); United States v. Bobadilla-Lopez, 954 F.2d 519, 522 (9th Cir. 1992). The  
 10 production of agents' notes is not required under Fed. R. Crim. P. 16 because the United States has  
 11 "already provided defendant with copies of the formal interview reports prepared therefrom." United  
 12 States v Griffin, 659 F.2d 932, 941 (9th Cir. 1981). In addition, the United States considers the rough  
 13 notes of its agents to be United States' work product, which Fed. R. Crim. P. 16(a)(2) specifically  
 14 exempts from disclosure.

## 15           **5. Tangible Objects**

16 The United States has complied and will continue to comply with Fed. R. Crim. P. 16(a)(1)(E)  
 17 in allowing Defendant Vasquez-Cabralles an opportunity, upon reasonable notice, to examine, inspect,  
 18 and copy all evidence seized and/or tangible objects that are within the possession, custody, or control  
 19 of the United States, and that are either material to the preparation of Defendant Vasquez-Cabralles'  
 20 defense, or are intended for use by the United States as evidence during its case-in-chief, or were  
 21 obtained from or belongs to Defendant Vasquez-Cabralles. The United States need not, however,  
 22 produce rebuttal evidence in advance of trial. See Givens, 767 F.2d at 584.

## 23           **6. Expert Witnesses**

24 The United States has complied and will continue to comply with Fed. R. Crim. P. 16(a)(1)(G)  
 25 and provide Defendant Vasquez-Cabralles with notice and a written summary of any expert testimony  
 26 that the United States intends to use during its case-in-chief at trial under Fed. R. Evid. 702, 703, or 705.  
 27 In addition, the United States will provide Defendant Vasquez-Cabralles with any scientific tests or  
 28 examinations, in accordance with Fed. R. Crim. P. 16(a)(1)(F).

1                   **7. Witness Addresses**

2                   The United States objects to Defendant Vasquez-Cabralas' request for witness addresses and  
 3 phone numbers. Defendant Vasquez-Cabralas is not entitled to the production of addresses or phone  
 4 numbers of possible witnesses for the United States. See United States v. Hicks, 103 F.3d 837, 841 (9th  
 5 Cir. 1996); United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977), cert denied, 419 U.S. 834  
 6 (1974). None of the cases cited by Defendant Vasquez-Cabralas, nor any rule of discovery, requires the  
 7 United States to disclose witness addresses. There is no obligation for the United States to provide  
 8 addresses of witnesses that the United States intends to call or not call. Therefore, the United States will  
 9 not comply with this request.

10                  The United States will produce the names of witnesses it intends to call at trial. Defendant  
 11 Vasquez-Cabralas has already received access to the names of potential witnesses through the discovery  
 12 sent to his counsel. The United States is not aware of any individuals who were witnesses to Defendant  
 13 Vasquez-Cabralas' offense except the law enforcement agentes who apprehended him. The names of  
 14 these individuals have already been provided to Defendant Vasquez-Cabralas.

15                   **8. Jencks Act Material**

16                  The United States will fully comply with its discovery obligations under the Jencks Act. For  
 17 purposes of the Jencks Act, a "statement" is (1) a written statement made by the witness and signed or  
 18 otherwise adopted or approved by him, (2) a substantially verbatim, contemporaneously recorded  
 19 transcription of the witness' oral statement, or (3) a statement by the witness before a grand jury. See  
 20 18 U.S.C. § 3500(e). Notes of an interview only constitute statements discoverable under the Jencks  
 21 Act if the statements are adopted by the witness, as when the notes are read back to a witness to see  
 22 whether or not the government agent correctly understood what the witness said. United States v.  
 23 Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)).  
 24 In addition, rough notes by a government agent "are not producible under the Jencks Act due to the  
 25 incomplete nature of the notes." United States v. Cedano-Arellano, 332 F.3d 568, 571 (9th Cir. 2004).

26                  Production of this material need only occur after the witness making the Jencks Act statements  
 27 testifies on direct examination. See United States v. Robertson, 15 F.3d 862, 873 (9th Cir. 1994).  
 28 Indeed, even material that is potentially exculpatory (and therefore subject to disclosure under Brady)

1 need not be revealed until such time as the witness testifies on direct examination if such material is  
 2 contained in a witness's Jencks Act statements. See United States v. Bernard, 623 F.2d 551, 556 (9th  
 3 Cir. 1979). Accordingly, the United States reserves the right to withhold Jencks Act statements of any  
 4 particular witness it deems necessary until after they testify.

5           **9. Informants and Cooperating Witnesses**

6           Defendant Vasquez-Cabralas incorrectly asserts that Roviaro v. United States, 353 U.S. 52  
 7 (1957), establishes a per se rule that the United States must disclose the identity and location of  
 8 confidential informants used in a case. Rather, the Supreme Court held that disclosure of an informer's  
 9 identity is required only where disclosure would be relevant to the defense or is essential to a fair  
 10 determination of a cause. Id. at 60-61. Moreover, in United States v. Jones, 612 F.2d 453 (9th Cir.  
 11 1979), the Ninth Circuit held:

12           The trial court correctly ruled that the defense had no right to pretrial discovery of  
 13 information regarding informants and prospective government witnesses under the  
 14 Federal Rules of Criminal Procedure, the Jencks Act, 18 U.S.C. § 3500, or Brady v.  
Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

15           Id. at 454. As such, the United States is not obligated to make such a disclosure, if there is in fact  
 16 anything to disclose, at this point in the case.

17           As previously stated, the United States will provide Defendant Vasquez-Cabralas with a list of  
 18 all witnesses which it intends to call in its case-in-chief at the time the United States' trial memorandum  
 19 is filed, although delivery of such a list is not required. See United States v. Dischner, 960 F.2d 870 (9th  
 20 Cir. 1992); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987); United States v. Culter, 806 F.2d  
 21 933, 936 (9th Cir. 1986). Defendant Vasquez-Cabralas, however, is not entitled to the production of  
 22 addresses or phone numbers of possible witnesses for the United States. See United States v. Hicks, 103  
 23 F.3d 837, 841 (9th Cir. 1996); United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977), cert.  
 24 denied, 419 U.S. 834 (1974). Defendant Vasquez-Cabralas has already received access to the names  
 25 of potential witnesses in this case in the investigative reports previously provided.

26           **10. Residual Request**

27           As to exculpatory information, the United States is aware of its obligations under Brady v.  
 28 Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) and will comply. In

1 addition, the United States has complied and will continue to comply with United States v. Henthorn,  
2 931 F.2d 29 (9th Cir. 1991) by requesting that all federal agencies involved in the criminal investigation  
3 and prosecution review the personnel files of the federal law enforcement inspectors, officers, and  
4 special agents whom the United States intends to call at trial and disclose information favorable to the  
5 defense that meets the appropriate standard of materiality. See United States v. Booth, 309 F.3d 566,  
6 574 (9th Cir. 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the  
7 materiality of incriminating information in the personnel files is in doubt, the information will be  
8 submitted to the Court for an in camera inspection and review. Thus, as already indicated, the United  
9 States will continue to comply with its discovery obligations in a timely manner.

**B. LEAVE TO FILE FURTHER MOTIONS**

11 The United States does not oppose Defendant Vasquez-Cabral's request to file further motions  
12 if they are based on new discovery or other information not available to Defendant Vasquez-Cabral  
13 at the time of this motion hearing.

IV

## CONCLUSION

16 For the foregoing reasons, the United States requests the Court deny Defendant Vasquez-  
17 Cabrales' Motions to Compel Discovery and Leave to File Further Motions, unless unopposed.

18 || DATED: May 10, 2008.

Respectfully submitted,

KAREN P. HEWITT  
United States Attorney

/s/ Joseph J.M. Orabona  
JOSEPH J.M. ORABONA  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ) Criminal Case No. 08CR0972-WQH  
Plaintiff, )  
v. )  
RAMON VASQUEZ-CABRALES (1), )  
Defendant. )  
)  
**CERTIFICATE OF SERVICE**

**IT IS HEREBY CERTIFIED that:**

I, Joseph J.M. Orabona, am a citizen of the United States and am at least eighteen years of age.

My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **The United States' Response in Opposition to Defendant's Motions to Compel Discovery and Leave to File Further Motions** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Linda Lopez, Esq.  
Federal Defenders of San Diego, Inc.  
225 Broadway, Suite 900  
San Diego, California 92101  
Tel: (619) 234-8467  
Email: linda\_lopez@fd.org  
*Lead Attorney for Defendant*

A hard copy is being sent to chambers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 10, 2008.

/s/ *Joseph J.M. Orabona*  
JOSEPH J.M. ORABONA  
Assistant United States Attorney